

MEMORANDUM

TO: Board of Environmental Protection

FROM: Andrew Fisk and David Courtemanch
Bureau of Land and Water Quality, Augusta

DATE: June 15, 2006

RE: Chapter 587, In-stream Flow and Water Level Standards
Post to Hearing

Statutory and Regulatory Reference: The statutory authority for this rule is contained in Title 38, Section 470-H, Water use standards, rules. Title 38, Section 470-H reads as follows:

The board shall adopt rules that establish water use standards for maintaining in-stream flows and GPA lake or pond water levels that are protective of aquatic life and other uses and that establish criteria for designating watersheds most at risk from cumulative water use. Standards adopted under this section must be based on the natural variation of flows and water levels, allowing variances if use will still be protective of water quality within that classification. Rules adopted under this section are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.

This mandate has been modified by two pieces of legislation passed in the current legislative session, addressing agricultural water use and public water supplies. LD 1776, adopted as Public Law Chapter 559 creates an agricultural water management board and gives agricultural water users five years to achieve compliance with these rules. And LD 2070, adopted as Resolve Chapter 190, directs the Department to work with stakeholders to:

“reconcile, to the extent feasible, the objectives of protecting aquatic life and other uses as provided in Title 38, section 470-H and the objective of allowing community public water systems to use their existing water supplies to provide water service.”

Scope: This chapter establishes the means to assign water flows and water level standards for all classified waters in Maine.

Description: The Department requests permission to post to public hearing Chapter 587, In-stream Flow and Water Level Standards. The Department currently has no rules relating to these issues.

Background: There is currently no specific standard for stream flows or lake levels in Maine statute or regulation. The DEP has historically implemented the designated uses and narrative water quality standards of a particular water body by applying best professional judgment to the circumstances of the individual case. LURC has historically based its decisions in part on technical review by DEP.

Under the direction of the Land and Water Resources Council, beginning in 2000 the DEP in coordination with other interested state agencies conducted a two year stakeholder process to develop sustainable water use policies for Maine. Water users that were actively involved include: public water suppliers, agricultural water users, industrial water users including the forest products industry, the pulp and paper industry, and the hydropower industry, commercial water users including the ski industry. Environmental organizations, and state and federal agencies were also involved in this process.

The final recommendations from that process formed the basis upon which the legislature adopted Title 38, Article 4-B, in 2002, which established the Water Withdrawal Reporting Program and included the statutory authorization for this DEP rulemaking.

After collecting the first year of data under the water withdrawal reporting program, in 2004 the DEP began working with a technical committee assembled from interested state agencies to guide the development of a draft rule. In March, 2005, the DEP posted a pre-rulemaking draft on the DEP website and invited public comment. Over the next few months DEP staff attended meetings with various water user groups to discuss the draft. Over 100 pages of written public comments were received on the draft. The present draft represents the DEP's effort to consider all of this input and propose a workable framework for water use regulation.

Stakeholder engagement has continued through the most recent legislation session, and the discussions around the recent legislation cited above. And in response to the directive of Chapter 190, Department staff have held four stakeholder meetings with representatives of community public water supplies, environmental groups and others. Language developed through these stakeholders meetings is included in this draft.

The Department maintains a website for this rulemaking that includes various background material. This includes a memo summarizing the scientific and technical basis for the criteria proposed in this rule. The address is:
<http://www.maine.gov/dep/blwq/topic/flow/index.htm>

Overview: The policies underlying this rule began to take shape during the Sustainable Water Use Policy (SWUP) process under the auspices of the Land and Water Resources Council in 2000 and 2001. Based on input received through that process from stakeholders and other agencies, and as further developed through the legislative process,

some early policy decisions were included in the language of the authorizing statute cited above. Specifically, that:

- The standards shall be protective of aquatic life and other uses.
- The standards must be based on the natural variation of flows and water levels.
- The standards shall allow variances if use will still be protective of water quality within that classification.

Other policy choices made by the DEP based on the input received through the SWUP process and other more recent in-depth discussions with various agencies and stakeholders include:

- The establishment of a standard flow with options for establishing alternatives
- The rule would not require any new permit process for water use
- Existing permits would continue to be valid
- The rule would provide the basis for consistency between DEP and LURC

As cited above, two additional pieces of legislation this past session gave further guidance for how to address agricultural and public water supply issues in this rulemaking effort.

The present draft represents the Department's effort to craft a rule respecting these policy decisions and providing a workable framework within which to address future water use issues.

Department Recommendation: The Department recommends the Board post this rule to public hearing on August 3, 2006.

Estimated Time of Presentation: Approximately 60 minutes.